

3
NO. 89-797

Supreme Court, U.S.

FILED

DEC 20 1989

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

DON PIERCE, ET AL.,

PETITIONERS,

V.

COMMERCIAL WAREHOUSE, ET AL.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPPOSITION BRIEF OF RESPONDENTS PARTS
& EQUIPMENT DISTRIBUTORS, INC.,
COMMERCIAL WAREHOUSE, DIVISION OF
THOMPSON AUTOMOTIVE WAREHOUSE, INC.,
UNITED EQUIPMENT SALES, INC., AND
TAMPA BRAKE & SUPPLY CO., INC.

ROBERT L. CIOTTI
(COUNSEL OF RECORD)
DONALD R. SCHMIDT
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH
& CUTLER, P.A.
ONE HARBOUR PLACE
POST OFFICE BOX 3239
TAMPA, FLORIDA 33601
(813) 223-7000

Alan D. Watson
YEAKLE & WATSON
890 Florida Federal Bldg.
One Fourth Street North
St. Petersburg, FL 33701
Counsel for United
Equipment Sales, Inc.

R. Frederick Melin
Attorney at Law
300 Hyde Park Avenue
Post Office Box 3411
Tampa, Florida 33601
Counsel for Tampa
Brake & Supply Co.,
Inc.

QUESTION PRESENTED

Did the courts below err in concluding that there was no triable issue in this case where the parties cross-moved for summary judgment on a dispositive threshold issue (whether petitioners are "purchasers" from manufacturer-respondents under the Robinson-Patman Act) as to which there was no dispute as to any material fact?

INTERESTED PARTIES

Warehouse distributor-respondents:

1. Commercial Warehouse, Division
of Thompson Automotive Warehouse,
Inc.
2. EMB Brake and Automotive Supply,
Inc.^{1/}
3. Parts & Equipment Distributors,
Inc.
4. Tampa Brake & Supply Co., Inc.
5. United Equipment Sales, Inc.

^{1/} EMB Brake and Automotive Supply,
Inc., a defendant below, has not taken
part in this brief.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTERESTED PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.	iv
STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
CONCLUSION	8

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Great Atlantic & Pacific</u> <u>Tea Co., Inc. v. Federal</u> <u>Trade Commission, 440 U.S.</u> <u>69, 99 S. Ct. 925, 59 L. Ed.</u> <u>2d 153 (1979)</u>	 7

No. 89-797

In The
Supreme Court of the United States
October Term, 1989

Don Pierce, et al.,

Petitioners,

v.

Commercial Warehouse, et al.,

Respondents.

On Petition For Writ of Certiorari
to the United States Court of Appeals
For the Eleventh Circuit

OPPOSITION BRIEF OF RESPONDENTS PARTS
& EQUIPMENT DISTRIBUTORS, INC.,
COMMERCIAL WAREHOUSE, DIVISION OF
THOMPSON AUTOMOTIVE WAREHOUSE, INC.,
UNITED EQUIPMENT SALES, INC., AND
TAMPA BRAKE & SUPPLY CO., INC.

Respondents Parts & Equipment
Distributors, Inc., Commercial Warehouse,
Division of Thompson Automotive
Warehouse, Inc., United Equipment Sales,

Inc., and Tampa Brake & Supply Co., Inc. (collectively referred to as the "warehouse distributors" or the "WDs") respectfully oppose the Petition for Writ of Certiorari filed by the plaintiffs below (collectively referred as to the "jobbers"). The jobbers seek review of a decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the summary judgment granted by the United States District Court for the Middle District of Florida in favor of the warehouse distributors and the seven manufacturers of automotive parts that were defendants in this action (collectively referred to as the "manufacturers"). Both the district court and the court of appeals concluded that the jobbers had not made out a claim under Section 2(a) of the Robinson-Patman Act because the undisputed facts were

legally insufficient to meet the requirements of the indirect purchaser doctrine.

STATUTE INVOLVED

This case involves Sections 2(a) and 2(f) of the Robinson-Patman Act, 15 U.S.C. §13(a) and (f). Section 2(a) provides in pertinent part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality

Section 2(f) provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

STATEMENT OF THE CASE

The warehouse distributor-respondents adopt the counterstatement of the case as set forth by the manufacturer-respondents in their Opposition Brief, which is being filed concurrently with this brief.

SUMMARY OF ARGUMENT

As the manufacturer-respondents demonstrate in their Opposition Brief, this case does not involve either dual distribution or price discrimination. It is undisputed that the manufacturers sell only to the warehouse distributors, and each does so at uniform prices. The jobbers, therefore, have shown no basis for imposing §2(a) liability on the manufacturers.

Since the jobbers' only claim against the warehouse distributor-respondents is based on buyer liability under §2(f), that claim must also fail because buyer liability is completely derivative and cannot occur in the absence of seller liability.

ARGUMENT

In the interest of judicial economy, the warehouse distributors adopt the Opposition Brief filed in this case by the manufacturer-respondents and will not restate the manufacturers' arguments here. As the manufacturers demonstrate, the jobbers have failed to meet the threshold "two sale" requirement of the Robinson-Patman Act because the manufacturers are not dual distributors, nor are the WDs mere "dummies" controlled by the manufacturers. As the manufacturers further demonstrate, the jobbers were unsuccessful in the courts below precisely because they have no record support for their novel application of the indirect purchaser doctrine. Thus, the jobbers have failed to show a violation of §2(a) of the

Robinson-Patman Act, nor have they shown any reason why this Court should review the judgments of the courts below.

The jobbers' sole claim against the warehouse distributors is based on derivative liability under §2(f) of the Robinson-Patman Act for knowing receipt of an unlawful price discrimination. It is undisputed that buyer liability under §2(f) is wholly dependent on seller liability under §2(a) of the Act, and, therefore, cannot occur in the absence of seller liability. Great Atlantic & Pacific Tea Co., Inc. v. Federal Trade Commission, 440 U.S. 69, 76-77, 99 S. Ct. 925, 931, 59 L. Ed. 2d 153, 161 (1979). Since the jobbers have failed to demonstrate any reason why this Court should review their case against the manufacturer-sellers pursuant to §2(a),

they have, for identical reasons, failed to make the necessary showing against the warehouse distributors under §2(f).

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,



Robert L. Ciotti
(Counsel of Record)
Donald R. Schmidt
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH
& CUTLER, P.A.
One Harbour Place
Post Office Box 3239
Tampa, Florida 33601
(813) 223-7000
Counsel for Parts &
Equipment Distributors,
Inc. and Commercial
Warehouse, Div. of
Thompson Automotive
Warehouse, Inc.

Alan D. Watson
YEAKLE & WATSON
890 Florida Federal Bldg.
One Fourth Street North
St. Petersburg, FL 33701
Counsel for United
Equipment Sales, Inc.

R. Frederick Melin
Attorney at Law
300 Hyde Park Avenue
Post Office Box 3411
Tampa, Florida 33601
Counsel for Tampa
Brake & Supply Co.,
Inc.